No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF *AMICUS CURIAE* AMERICA'S COLLECTIBLES NETWORK, INC. d/b/a JEWELRY TELEVISION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae, America's Collectibles Network, Inc. d/b/a Jewelry Television (herein "JTV"), has a direct interest in supporting Respondents' position in this case. Were this Court to abrogate the "physical-presence" nexus standard of *Bellas Hess* and *Quill*, in reliance on which JTV has developed its business platform, it is likely JTV's operations would be significantly disrupted. JTV would incur enormous expenses as States and other taxing authorities would use the precedential vacuum to make JTV their tax collector. JTV would have to learn the rules of 12,000 taxing jurisdictions and incorporate those rules into its existing software solutions. These taxing districts have little incentive to ease compliance and may not provide maps and other sales tax information in a format that can be integrated with JTV's existing software.

Quill's physical presence standard is a vital bulwark against overreach by State and local jurisdictions

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[1] This Brief is filed pursuant to a blanket consent filed by all parties. No person other than the *Amicus* and its counsel has authored this Brief in whole or in part, or made a monetary contribution toward its preparation or submission. Lawyers in the Birmingham, Alabama office of Waller Lansden Dortch & Davis represent Newegg, Inc. in a separate matter pending in Alabama Tax Court. However, Newegg, Inc. has not contributed financially to the preparation of this Brief. The factual assertions in this Brief were provided to Counsel of Record directly by Timothy B. Matthews, President & CEO of JTV, and its Vice Chairman and Legal Counsel, Charles A. Wagner III. Mr. Matthews and Mr. Wagner are members of the Tennessee Bar. On March 26, 2018, counsel provided counsel of record for all parties the notice required by Rule 37.2.a.

and allows JTV to operate its business pending proper federal legislation, which JTV has long sought. Abrogation of *Quill* would likely result in an enormous undue burden on interstate commerce for JTV and similarly situated remote retailers, even assuming a software solution were available, which is not at all certain. JTV thus has an interest in supporting the position of the Respondents and the *Quill* rule.

SUMMARY OF ARGUMENT

JTV supports Respondents in opposing Petitioner's request that the Court abrogate the "*Quill* Rule." *Quill* is not outmoded nor an outlier. In fact it is *Quill*'s bright-line rule that enables JTV to operate until Congress acts, without having to comply with impossible or prohibitively expensive state or locally imposed tax collection requirements. There are 12,000 state and local taxing jurisdictions nationwide, so abrogation of *Quill* would hit JTV with a tidal wave of overwhelming tax collection obligations.

JTV is privately-owned, principally by its employees. Since its inception in 1993, the company has grown from C-band satellite broadcasting to a current reach of 85 million television households across all 50 States through analog and digital television, direct-to-home satellite systems, cable system operators, and emerging over-the-top (OTT) technologies like AppleTV. Its products can also be purchased online at www.jtv.com. During the past 25 years, JTV has grown its gross

revenues to more than $600 million and currently employs over 1,500 employees in Knoxville, Tennessee. Its products are delivered to its customers nationwide by U.S. Mail, UPS, FedEx, and other interstate carriers. It does not have a physical presence in any other state that imposes a sales tax and only collects sales taxes in Tennessee and Connecticut.

To operate its business JTV has developed unique, proprietary software over 25 years, the modification of which is complex and expensive, and the prospect of being required to comply with 12,000 sales tax jurisdictions is overwhelming.

At its core, South Dakota's argument is that the "virtual welter of complicated [tax collection] obligations" faced by remote mail-order vendors at the time of *Bellas Hess* in 1967 and *Quill* in 1992 has been "washed away"[2] by a technological wave. Petitioner says "it was impossible then to imagine a world where the data needed to answer almost any question would be immediately available from almost any computer terminal, laptop or smart phone."[3] Petitioner then makes the extravagant and unsupported claim that "the alleged practical difficulties of [sales tax] collection have now vanished."[4]

Petitioner's argument belies reality. The real world difficulties experienced by JTV confirm the

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[2] Petitioner's Brief, at 2.

[3] Petitioner's Brief, at 12.

[4] Petitioner's Brief, at 19.

findings of independent studies that the challenges of sales tax collection remain extreme.[5]

From its experience in an unsuccessful attempt to develop software to comply with sales tax collection obligations in Colorado, JTV knows that "the welter of complicated obligations" has not been "washed away" – if anything the degree of complication is even greater today. The "practical difficulties" of collecting sales taxes have not "vanished," but have only compounded, and the capability of computers "to answer almost any question immediately" is a fantasy in the context of sales tax collection by remote vendors. As we explain, technology has not destroyed the need for *Quill*, but reinforced it.

Were the Court to abrogate the physical-presence nexus standard enunciated in *Quill*, what would replace it? "Economic nexus" alone is insufficient to limit adequately State power to regulate and tax nonresident vendors, and would make jurisdictional boundaries irrelevant. Unlike for Due Process, for purposes of Commerce Clause jurisprudence, the "economic nexus" test would be no test at all, emasculating the Commerce Clause, and granting license to the States and their political subdivisions to place upon interstate commerce whatever burdens they choose.

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[5] *See, e.g.*, Larry Kavanagh, *Expert Report Concerning the Costs and Burdens for Remote Retailers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama* (Aug. 28, 2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf.

Commerce Clause standards necessarily must preserve the integrity of federal-state relationships and impose limits on the States' jurisdictional reach.

If any new taxing nexus standard that lacked a "physical-presence requirement" and relied solely on the existence of an economic transaction were adopted by the Court, considerable controversy and new legal questions would arise by giving States and their political subdivisions – cities, municipalities, regional authorities, and special taxing districts – the latitude to exert national taxing authority with disparate rates, tax bases, exemptions, exclusions, holidays, and terms and conditions of collection. The resulting further proliferation of rules and regulations would create a truly chaotic taxing regime and would place an undue burden on interstate commerce that would clearly be Constitutionally unsound.

JTV is not looking for a "tax break" or an advantage over local "brick and mortar" vendors. Rather, it opposes the Court imposing an unfair economic burden of having to comply with 12,000[6] varying sets of complex and inconsistent rules which would be crippling to remote retailers. JTV simply seeks compliance simplification – one rate and one set of exemptions and rules per state, all in a downloadable format that can be used electronically. The States have resisted that simplification for 25 years, many choosing instead to

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[6] This is the number seen in the Briefs, but it is estimated as high as 16,000. No one really seems to know the exact number. Advisory Comm'n on Elec. Commerce, Report to Congress (Apr. 2000), http://govinfo.library.unt.edu/ecommerce/acec_report.pdf.

further complicate their systems and proliferate their taxing districts, while simultaneously complaining about remote vendors not complying.

There are grave reasons for judicial caution when the Court is asked to upend *stare decisis* in this case. The Court should deny the relief requested by Petitioner and leave resolution of this issue to Congress where it belongs.

Nevertheless, if the Court were to decide to modify the *Quill* rule, any change in the physical-presence requirement should be limited in scope to those States that adopt a simplified sales tax collection system – one rate, one base, and one set of exemptions and rules per state, all in an easily downloadable, electronic format, with one reporting location and one audit per state.

ARGUMENT

I. PETITIONER'S LINCHPIN ARGUMENT THAT "THE ALLEGED PRACTICAL DIFFICULTIES OF [SALES TAX] COLLECTION HAVE NOW VANISHED"[7] IS UNFOUNDED.

The entire thrust of Petitioner's argument – indeed its linchpin – is that "the alleged practical difficulties of [sales tax] collection have now vanished." This is unsupported and wrong.

[7] Petitioner's Brief, at 19.

Petitioner and its *Amici* argue that circumstances have changed since the 1992 *Quill* decision, that Internet sales were not envisioned at that time,[8] and that technology has now advanced to the point that collection of sales taxes is only a "mouse click away" for remote sellers. One can debate whether the proliferation of Internet retail was contemplated in 1992 (the world wide web was born in 1991), but the suggestion that sales tax collection is as simple as "clicking a mouse" is simply untrue.

Petitioner and its *Amici* next argue that remote vendors are trying to continue to enjoy a "tax shelter," and that the "tax shelter" prevents the States from collecting their sales taxes on sales to their residents by remote vendors. However, Petitioner and its *Amici* completely ignore that the grievous challenge for remote vendors collecting States' sales taxes arises almost exclusively from the labyrinthine complexity of the sales taxing regimes of States that allow multiple local jurisdictions to impose varying rates and rules.

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[8] Petitioner's briefing suggests there are two primary forms of commerce, brick and mortar and e-commerce. But shopping by television and radio, without a physical presence, was common at the time of *Quill* and remains so today. The Court in *Quill*, in fact, made specific mention of radio advertisements as a mode of promoting one's products. 504 U.S. 298, 313 n.6 (1992). The oldest home television shopping network started with radio broadcasts in Florida in 1977 (HSN), some 15 years before *Quill* was decided, and the largest home shopping network (QVC) was started in 1986. JTV was started in 1993, contemporaneously with *Quill*. These companies still use television as a primary sales method, as do "infomercials."

Notwithstanding advances in computer technology, the *Quill* rule is a vital, necessary protection against States imposing disparate requirements, and the undue burdens on interstate commerce arising out of the technical complexities of sales tax collection that abrogating *Quill* would allow States and their political subdivisions to place on remote vendors.

A. The *Quill* Rule Protects Against Disparate State Requirements and Burdens of the States' Own Making, Which the States Seek to Shift to Remote Vendors.

State sales tax complexity is not new. It was recognized as a critical issue in the 2000 report of the Advisory Commission on Electronic Commerce (ACEC), the Commission that Congress established by the Internet Tax Freedom Act[9] and the precursor to the Streamlined Sales Tax Governing Board, Inc. This report recommended that the States:

> simplify their state and local transaction tax systems in a manner which would equalize the burdens of tax collection . . . [to] not be more burdensome on a business that collects and remits taxes to several taxing jurisdictions than it is to a business that collects and remits taxes in a single taxing jurisdiction.[10]

The recommended simplification requirements included many concepts subsequently incorporated into

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[9] 47 U.S.C. § 1102 (2011).

[10] Advisory Comm'n on Elec. Commerce, *supra* n.6.

the Streamlined Sales and Use Tax Agreement (SSUTA), and also included "one rate per state." However, only 23 States, representing 31% of the country's population, signed the SSUTA, and the States rejected entirely the one rate per state rule. Moreover, since *Quill*, the taxing jurisdictions of state and local governments have grown from 6,000[11] to over 12,000, and the States are manifestly attempting to shift the burden of the complexity of their taxing systems to remove vendors based on the unfounded assumption that advances in technology have eased the burden of collection.

As Justice Kennedy has articulated:

> One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses.[12]

The dormant Commerce Clause prohibits State taxation or regulation "that discriminates against or unduly burdens interstate commerce." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The burdens imposed by state law must be carefully examined in all instances. Abrogation of *Quill* would result in States and political subdivisions imposing taxing and collection obligations on remote vendors. While "one rate per state" may arguably be an "incidental"

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[11] *Quill*, at 313 n.6.

[12] *U.S. v. Lopez*, 514 U.S. 549, 579 (1995).

burden on interstate commerce, the burden a regime of nationally imposed local taxes, rules, and processes would impose on remote vendors like JTV is far from incidental.

The Court in *Wynne* cited the foundational danger of State-imposed burdens which the Commerce Clause protects against: "By prohibiting States from imposing excessive burdens on interstate commerce without congressional approval, it [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce."[13]

The States have consistently rejected a simple solution that would involve one rate, one base, one auditing authority, and one set of rules, all in an easily downloadable format, that over time could be adopted by even the smallest remote vendor. Indeed, the States rejected the advice of the ACEC as well as the work of the National Tax Association's Project on Electronic Commerce and Telecommunication Taxes,[14] both of which urged the States to simplify their sales tax systems, *especially* the multitude of rates.

Furthermore, in addition to the six States that allow completely local options for taxing remote

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[13] *Comptroller of Treasury v. Wynne*, 135 S.Ct. 1787, 1795 (2015).

[14] Kendall L. Houghton & Gary C. Cornia, *The National Tax Association's Project on Electronic Commerce and Telecommunication Taxes*, 53:4 Nat'l Tax J. 1351 (2000).

vendors,[15] States that are not members of SSUTA are free to do the same, and they comprise a majority of the States and represent 69% of the country's population.

In summary, since *Quill* was decided, (i) the number of taxing jurisdictions has increased from 6,000 to 12,000; (ii) even among the 23 States (including South Dakota) that accepted SSUTA, the "one rate per state requirement" necessary for true simplification was rejected;[16] and (iii) the States continue to craft a confounding maze of local law requirements that would unduly burden interstate commerce in the absence of *Quill*.

The prospect of the Court abrogating *Quill* and potentially subjecting out-of-state sellers to the complexities of 12,000 tax jurisdictions across 50 States is daunting. The "Pandora's Box" associated with multiple disparate local tax schemes, in contradistinction to a uniform, state-wide rate, is inadequately addressed

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[15] *See* Scott Drenkard, *State and Local Sales Tax Base Conformity Issues in Other States*, Tax Foundation (Oct. 28, 2015), https://taxfoundation.org/state-and-local-sales-tax-base-conformity-issues-other-states/. Louisiana, Alaska, Arizona, Colorado, Idaho, and New Jersey constitute 8.8% of the U.S. population and generate sales for JTV averaging $52,800,000 annually – a significant revenue loss were JTV to have to forego sales to customers in those States.

[16] *See* John Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 Nat. Tax J. 605, 606-07 (2005).

in the record, but would be sprung wide open for new litigation if *Quill* were abrogated.

B. Retailer Burdens Associated with Multi-Jurisdictional Sales Tax Collection and Reporting Remain Enormous.

Advances in technology have increased computing power and network access, but those advances do not equate to simplicity of tax collection. It would be an erroneous leap of faith were the Court to conclude that increases in computing power and easy access to ubiquitous information "makes tax compliance easy."[17] JTV has first-hand experience with the actual complexities of tax collection in an e-commerce context, and nothing is "easy" about it.

1. Retailer Dependence on Proprietary Technology is a Significant Impediment to Tax Collection and Reporting.

Like many remote retailers, JTV is dependent upon proprietary, home-grown technology systems used to operate its business. These systems allow it to purchase product from vendors, ingest inventory, operate a warehouse system, take orders from customers,

[17] Much is made in the Briefs before the Court of the success of Amazon, a case of success that does not mirror any other e-commerce company, many of which continue to face fierce competitive challenges to their continued growth and profitability. The Court should not consider Amazon's success to be the typical case study for e-commerce.

fulfill those orders from JTV's warehouse, and accept returns. These home-grown systems, developed at great expense over the last 25 years, are vast, containing tens of millions of lines of computer code developed for JTV's specific purpose. The primary reasons for its dependence on "home-grown" software are that "off-the-shelf" software is generally not available to support the core operations of a television shopping network, available software requires extensive customization to meet JTV's specific requirements, and JTV is the vendor of unique products (such as loose gemstones) in a market niche that is too small to support development of software by a third party vendor. So, like many other retailers, JTV has had to develop systems on its own, and they are complicated to modify and to integrate with "off-the-shelf" software. Even with "off-the-shelf" software, integration is costly and burdensome, and effective integration of sales tax collection software into systems designed to manage sales and credit product returns in multiple jurisdictions is far from a "mouse click" away.

2. JTV's Experience with Colorado's Reporting Legislation has Validated the Complexity of Compliance.

JTV's experience attempting unsuccessfully to comply with Colorado's multi-jurisdictional tax system illustrates the complexity and resulting difficulty of local sales tax compliance in a State with multiple taxing districts, all with different sales tax rates and rules.

Colorado legislation, designed to circumvent *Quill*, required remote retailers either to collect and remit its sales taxes, or report on sales to Colorado customers. After the legislation was upheld in *Direct Mktg. Ass'n v. Brohl*,[18] JTV attempted in good faith to comply with Colorado's collection requirements, but, its effort to do so was unsuccessful.

Colorado does not furnish zip code, zip+4, or similar postal address range data to ensure a proper tax calculation. Colorado's Department of Revenue provides only a non-electronically processable PDF file that contains tables of multiple regional, city, and county taxes. Jurisdictional boundaries are not well defined. For example, the Colorado Regional Transportation District tax applies to: "Arapahoe County (south of I-70, generally west of Picadilly Rd. to Jewell, then west of Gun Club Rd. to Quincy, then generally west of Monaghan Rd., including Arapahoe Park and Aurora Reservoir). . . ."[19] Boundaries defined "generally" in this manner cannot be processed by a computer.

In order to track the multi-tier tax rates for special districts, cities, and counties throughout Colorado, a significant amount of geographic data is needed to determine which cities are in which counties in Colorado. There are 20 cities in Colorado that reside in two or more counties (e.g., portions of the City of

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[18] 814 F.3d 1129 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 591 (2016).

[19] Colorado Department of Revenue Publication DR1002, Colorado Sales/Use Tax Rates (Dec. 29, 2017), https://www.colorado.gov/pacific/sites/default/files/DR1002.pdf.

Littleton, Colorado, are present in Arapahoe, Jefferson, and Douglas counties). Determining the appropriate county rate based on a customer's city is not insufficient information and results in errors.

Ironically, officials in the Colorado Department of Revenue have recognized that this very complexity is a problem for taxpayers:

> Currently, Colorado has nearly 300 taxing authorities with differing sales and use tax bases, but when overlapping boundaries are taken into account, there are over 700 areas with different rates and bases. This situation produces a heavy burden on businesses operating in our state.[20]

Deciphering rates and requirements for Colorado's hundreds of taxing districts is a Herculean task which even a cursory examination of the ten page listing of Colorado Sales/Use Tax Rates[21] for each of the localities will reveal.

For JTV's systems to be able to support these complicated tax rules, JTV would need to make several large enterprise enhancements, would be required to construct a database schema with a set of tax tables to

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[20] *Uniform Sales and Use Tax Base Throughout the State: Recommendations to the General Assembly to Establish a Revenue-Neutral Uniform Sales and Use Tax Base Throughout the State, Required by HB 13-1288*, Colorado Dep't of Rev. (Dec. 2013), https://www.colorado.gov/pacific/sites/default/files/Uniform%20Sales%20and%20Use%20Tax%20Base.pdf.

[21] https://www.colorado.gov/pacific/sites/default/files/DR1002.pdf.

track the relationships between the cities, counties, and different rates, and would need to design a manual update mechanism because these rates change quarterly. In addition to the schema to hold data manually entered into the database from the Colorado Sales/Use Tax Rates PDF document, calculation logic to parse relationships between cities, counties, and the different tax tiers would need to be coded. This logic would optimally reside in a database stored procedure such that JTV's back-end processes like customer return refund processing could interact with the tax calculation logic for each transaction. In addition, the tax calculation logic would need to be exposed through the core service-oriented middleware to the internal applications for orders placed in JTV's call center. An additional interface would be required for JTV's website so that orders placed on the web platform could preview the tax applied to customer orders before payment is requested from the customer. Each integration would require development efforts, testing efforts, correctness validation, and ongoing deployments as new tax rates are published in each complex State.

JTV tried to comply with Colorado's taxing scheme, but it was too complex. Compliance would have required incorporating unpublished and often confusing local directives into existing software, and then ensuring this data could be appropriately validated and updated. Ultimately, JTV's expert software engineers were not able to complete this task.

In short, JTV's experience[22] with customized enterprise systems, its efforts to implement "off-the-shelf" software by major companies that claim to solve problems with a "mouse click," and specifically its unsuccessful effort to comply with Colorado's law, demonstrate the burdens on remote vendors imposed by conflicting, multi-jurisdictional rules are unduly burdensome, exactly the result that the Framers of the Commerce Clause would have wanted to avoid.

JTV's experience also illustrates why Petitioner's claims that software is "off-the-shelf," "plug-and-play," or predicting that implementation is only a "mouse click" away, should be viewed with extreme skepticism. Petitioner's statements regarding the ease of using tax collection software in this context are simply not correct.

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[22] In 2006, JTV contracted with a large company (Sterling Commerce/AT&T) to replace its order management, purchase order, and warehouse management systems and to integrate Sterling software into legacy systems. Sterling presented a timeline of 7 1/2 months for implementation and a budget of about $2 million. The implementation was a spectacular failure. Sterling's software could not be adapted to JTV's needs. Integration proved impossible. After devoting 13 months to implementation and after JTV spent over $10 million on the project, and the project failed, JTV sued Sterling Commerce over misrepresentations about the "ease" of implementation. In 2017, a jury granted JTV a verdict against Sterling Commerce for $39 million. This case is on appeal. *America's Collectibles Network, Inc. v. Sterling Commerce (Am.) Inc.*, No. 3:09-CV-143, Doc. 814 (E.D. Tenn. 2017).

3. Burdens Associated with Processing Sales Tax Credits are Significant and Overlooked.

JTV has experience in other aspects of sales tax collection that are not addressed in other Briefs, but are relevant to the question of burden. Because JTV's products cannot be seen in stores, and because its customers purchase "sight unseen" on television, JTV experiences a phenomenon prevalent in television home shopping – an extremely high return rate on products. Typically, approximately 25% of the goods sold by JTV to its customers are returned. These returns are not primarily due to product dissatisfaction. Rather, customers are selective – they like to try items for fit, touch and feel, and compare styles. They examine gemstones closely for attributes like color, cut, and clarity. JTV processes returns exceeding $150 million annually with the average transaction being under $100. Extensive systems are required to process millions of dollars of credits, partial credits and returns and to compute correct credit card refunds. Petitioner completely overlooks this "back end" complexity when touting "off-the-shelf" solutions.

For example, when processing the refund of a return or an exchange for an item priced less than the original item price, the amount of the sales tax charged at the time of the sale would need to be known. To do so JTV would be required either to track the tax percentage applied to the item at time of sale, or develop a way to request what the tax was, based upon the original order date. If multiple rates per state are applied,

the complexity increases exponentially. In addition, if the tax rates were volatile (e.g., quarterly changes), JTV would need to change its database stored procedure logic and, most likely, take it out of the database into Java code if using an external provider. In cases where an exchange for a more expensive item occurs, JTV would need to use the current tax rate that may have changed since the original sale, which would compound the tracking data and logic needed. All of this requires development time and no "off-the-shelf" solution exists for order return, partial return, and exchange tracking for JTV.

4. Multi-channel Retailing has Multiplied the Complexity of Systems and Increased the Burden of Sales Tax Collection.

As a multi-channel retailer JTV also has relevant experience in the conduct of electronic commerce. While 70% of its revenues are derived from its blend of entertainment, educational, and interactive television programming, JTV also operates a website, www.jtv.com, and mobile apps that comprise about 30% of JTV's sales. Multi-channel ordering systems have additional complexities, and often comprise disparate systems, all of which must be custom-modified at considerable expense in order to collect sales taxes.

Multi-channel retailing increases complexity at JTV in several ways. First, the order management system is more complex. JTV's home-grown software

interface (called "Jupiter") used by Call Center operators to take phone orders has approximately 1 million lines of code. The "core" system at JTV adds another approximately 870,000 lines of code. Other products such as JTV's "granite" server has 417,000 lines of code, the "Hoku" application, about 50,000, just for the service exposure component alone. More than 100 additional applications related to JTV's order system are supported. Depending upon how source code is counted, including items such as database stored packages, procedures and functions custom to its business, JTV's system easily has more than 10 million lines of custom code. This does not count code applicable to reporting functions including ETL mapping in Informatica, reports in the Microstrategy application, network device configurations for services and other applications supporting JTV's systems but not directly related to order management.

Second, multi-channel retailing means multiple point-of-sale (POS) systems. JTV uses several discrete POS systems, each requiring modification to accommodate a national sales tax tracking system. The discrete systems include Jupiter (mentioned above), EOS (or "Express Ordering System") for touch tone orders, Demandware's shopping cart (which is now being transitioned to an Oracle platform) for Internet orders, the iPhone/iPad apps for orders placed on Apple iOS mobile devices, the Android app for orders placed on Android OS devices, and systems in development for "over-the-top" devices such as Roku, Hulu, Amazon Fire, and AppleTV. Compliance would require

modifications across all seven systems, plus four additional systems under development.

Thus, what might at first appear to be a single software integration is, in fact, a multiple-platform integration involving seven different systems. A "tax lookup module" would have to be developed for, and integrated with, each and every distinctly different system used by the remote seller.

5. Additional Burdens to JTV Arise in the Absence of Off-the-Shelf Solutions.

The burden of multi-jurisdictional sales tax collection is further complicated by two additional technological complexities present at JTV and, likely, other remote sellers: database complexities and the assignment of tax codes to stock keeping units (SKUs).

JTV, like other retailers, operates with multiple database systems to store and update order records, each of which would require modification and updates. JTV's database environments include databases used for distinctly different purposes: production, testing, quality control, development, training, and backup. JTV has seven instances of its principal database (X5). Compliance would require modification of each and every one of these database structures. Because of the need to utilize multiple databases with essentially the same information, but used in different environments, the effect of one change is multiplied seven times as the same change must be coded in each separate

database instance. In addition to critical database instances to which the tax logic would need to be deployed (and redeployed with each change in any jurisdiction's tax rules), JTV would be required to change its new Oracle Web Commerce instances, of which there are presently four (development, quality assurance, user acceptance testing, and production) plus multiple local developer instances for development and, ultimately, a like process for periodic tax law updates.

As for SKU complexities, JTV presently has 146,659 active SKUs in its warehouse management system and is constantly introducing new styles to compete. Each year, approximately 107,000 SKUs are added to JTV's warehouse and many are removed as well. Some businesses can operate with a handful of products, but JTV cannot. Ever changing trends and consumer tastes dictate a constantly changing inventory makeup. Were JTV to be required to code its software to map to the requirements of 12,000 different jurisdictions, if each jurisdiction required different tax treatment based upon the product, its price, metal content, origin, or any one of any number of factors that a logical tax scheme could be based upon, at least 1.76 billion possible codes would need to be assigned to JTV's inventory in any given year and over 1.28 billion *new* codes would be required each year thereafter.

6. In Sum, the Assertion that Collection is "Simple" Belies Reality for Retailers Like JTV.

The assertions of simplicity in implementing tax collection software solutions made by various *Amici* supporting Petitioner are not grounded in any practical experience. Tax collection is not as simple as "adding a tax-collection widget to their websites" as the Retail Litigation Center, Inc. would have the Court believe.[23] Its claim that "[i]f Systemax could toggle the widget on its website to collect sales taxes, so can other absentee retailers"[24] is wholly foreign to the contrary experience of JTV.

It is simply a myth that sales tax collection software is cheap, effective and easy to obtain and implement. The "virtual welter" of complicated obligations that concerned the Court in *Bellas Hess* still exists.

C. Certified Service Providers (CSPs) Do Not Ease the Burdens.

Certified Service Providers (CSPs) and the States have reported in their Briefs that sales tax collection is "simple" to implement with the aid of CSPs. Again, this claim is contrary to the experience of JTV.

CSPs inherently lack expertise in the diverse panoply of proprietary order systems, and claims that their tax modules are "plug-and-play" are simply not

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[23] Brief of Retail Litigation Center, Inc., *et al.*, at 23.

[24] *Id.* at 25.

so. While the use of a CSP or its software might fit some businesses, the Court should not infer a lack of undue burden to interstate commerce on the whole. JTV serves as an example of where "off-the-shelf" solutions, which may facially have merit, prove unworkable in practice.

A number of significant technical implementation and other challenges remain in using CSPs, such as:

- Given the criticality of sales order placement, JTV would need to integrate with both a primary and a secondary CSP provider to ensure a reliable, continuing alternative should the primary CSP be down, change, or stop providing the service.
- CSPs lack standard messaging protocols, and thus JTV would require an intermediary integration layer to make transitioning to an alternate service possible in case of a primary CSP failure.
- Introducing external CSP systems into an existing system poses new risks. A third-party, cloud-hosted solution maintained by an unrelated party would expose JTV to the risk of service disruptions such as loss of network connectivity, change in API exposure, planned and unplanned service outages, denial of service attacks, other hacking, and changes in security; all of which could be very seriously disruptive of JTV's business.

- External CSPs may become targets for denial of service attacks once their use becomes more prevalent.
- The integration of a CSP service requires expert integration of data paths, network security, firewall configurations, and communications at very deep levels of JTV infrastructure. Integration at the database stored procedure level that JTV uses for transaction and returns processing would be very difficult for JTV because it would need to externalize and re-implement this logic – converting it from an Oracle stored package into Java code.
- Even with a CSP, JTV would need to duplicate tax data tracking to process returns correctly.
- In addition to the integration with existing JTV software, JTV would need to validate the correctness of the integration and perform its quality assurance function against the provider to make sure that the tax rules are operating properly, and then verify that the integrations were accurate.

The very existence of CSPs implies that tax collection is not as "easy" as has been suggested. Moreover, aside from the additional cost, a requirement that a remote seller use a CSP is unreasonable on its face because, in effect, that would make it dependent upon the CSP for its own viability. Such a mandate would be, *per se*, an undue burden on interstate commerce. In

addition to CSP fees, now or in the future, the integration costs and ongoing maintenance of interfaces to legacy software systems would remain significant. While some CSPs may integrate with some shopping carts, they do not integrate with all, not even with most. CSPs are not the answer.

Thus, JTV submits to the Court that bald assertions of "simplicity" asserted by Petitioner, without proof or adequate record, should be rejected. The practical, real burdens on interstate commerce that would be imposed by a requirement of multi-jurisdictional compliance if *Quill* were abrogated, should be sufficient to warrant rejection of Petitioner's request for a new nexus standard.

II. *QUILL* CONTINUES TO REMAIN IMPORTANT AS A BRIGHT-LINE STANDARD TO BALANCE INTERESTS IN COMMERCE AMONG THE STATES AND THE FEDERAL GOVERNMENT.

A. The Purpose of the Commerce Clause is to Balance Federal and State Interests and Prevent State Conflicts in Commerce, including Local Laws Conflicting with National Interests, Not to Address "Fairness" in Retail Trade.

The Commerce Clause strikes a balance between the power of the federal government and the States, and among the States themselves, and allows federalism to function effectively. Congress can override the

States to protect national interests but, in the absence of Congressional action, the States are free to develop distinctive governmental, regulatory, and tax schemes applicable to affairs within their political boundaries. This diversity and pluralism allow different state cultures, values, and norms to be expressed and, likewise, offer choices to citizens as to the State in which to reside and to conduct business.

However, the Constitution does not give States *carte blanche* to reach beyond their borders and develop what effectively would become a national scheme of taxation. The Framers did not intend to empower cities, municipalities, regional governments, and special taxing districts to overreach either. *See Northeast Bancorp. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) (discussing the economic "Balkanization" that would result without the restraints of the dormant Commerce Clause).

The focus of the Court should not be on creating "parity" in retail shopping experiences. The value-added services that a retail merchant with a physical presence in a jurisdiction enjoys are competitive advantages for that retailer. In contrast, the cost efficiencies of a national direct-to-consumer retailer are competitive advantages to that retailer. Retail shoppers can, and will, decide for themselves whether the "touch and feel" experience of a physical store is preferable to the "browse and transact" experience of the Internet, or JTV's "show and tell" experience of television shopping from one's living room. Resolution of the *Quill* issue should not hinge on which experience is

preferable, nor should the Court encourage or favor one over the other.

B. *Quill* is Neither an Outlier Nor Outmoded.

Some retail mediums and platforms have changed, but not in a way that affects the soundness of *Quill*. Catalogs present a retailer's assortment of merchandise to consumers, and Internet retail is simply an electronic form of catalog shopping. An Internet catalog avoids certain costs and inconveniences, but efficiency of presentation should be irrelevant to the Court's analysis.

Nor has the Internet eliminated long-existing methods of remote sales. American mailboxes are still packed with mail-order catalogs. Moreover, JTV's unique television broadcasting business is a clear illustration of why *Quill* remains relevant and is not outmoded. *Quill* has had, and continues to have, relevance in commerce besides retail websites, such as JTV's television broadcasts.

The fact that the Internet is universally available does not change the calculus either. It is merely a matter of degree. The "pervasive" character of the Internet is not determinative, any more than the number of printed mail order catalogs in a State would have been relevant under *Quill*. Similarly, the number of consumers reached by the Internet should not be determinative of the legal principle in issue.

Finally, the Court should note that the expansion of the Internet to millions of websites means that many retail websites are virtual needles in a haystack, have difficulty being found, struggle to succeed, and still compete with physical stores and large department store chains that collectively make up over 90% of U.S. retail shopping. The true outlier is Amazon, a company that accounts for over 43% of all sales made on the Internet,[25] and is expanding into all fields of retail and commerce.

As a result there is another different, but equally profound and pernicious discrimination threatened by abrogation of *Quill*. Were compliance software available, its cost would be relatively modest for behemoths like Amazon, affording such large entities an unfair advantage over everyone else.[26]

The suggestion by the United States through the Solicitor General's Brief that the Court should apply *Quill* to mail order and not e-commerce leaves an interesting gap. What about television broadcasting into the State from which consumers call JTV at its call center in Tennessee to place an order? None of the arguments about the ubiquity of the Internet or use of

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[25] *Amazon accounts for 43% of U.S. online retail sales, Business Insider* (Feb. 3, 2017, 12:12 PM), http://www.businessinsider.com/amazon-accounts-for-43-of-us-online-retail-sales-2017-2.

[26] Additional government regulation often encourages consolidation within industries and the eventual extinction of smaller companies. *Cf.* the banking industry and the loss of community banking over the last 20 years with the growing complexity of banking rules.

smartphones for "showrooming" or any of the other arguments for taxing electronic retail apply to JTV's (or anyone else's) phone orders. JTV's customers do not need a computer to place a phone order and JTV transacted business nationwide for years in this manner prior to starting a retail website, and continues to do so.[27]

If it were to be changed at all, any new *Quill* rule should provide even clearer guidance, and indeed it would, if the Court strengthened the physical presence requirement by requiring as a condition for taxable nexus that a remote seller's physical presence would have to be related to the sales activity, and *unrelated* activities would be disregarded.

The principle of *stare decisis* should be applied to protect remote vendors like JTV, who have operated for 25 years or more in reliance on *Quill*'s continued viability, and have developed at great expense national business models with pervasive economic presence even without their Internet operations. For 25 years JTV has reasonably relied upon *Quill* in building and conducting its business in compliance with federal, state, and local laws. There has been no "manifest change in circumstances" since 1992 and the arguments that there has been a "manifest change in circumstances" and there is an "absence of justified reliance" have no application to remote retailers such as JTV.

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[27] *See supra* n.8 (relevant to QVC, HSN, and the history of television home shopping).

III. IF *QUILL* WERE ABROGATED, A STRONGER TEST THAN "ECONOMIC NEXUS" WOULD BE WARRANTED TO PRESERVE MEANING TO THE DORMANT COMMERCE CLAUSE.

If the Court were to alter the "physical presence" test of *Quill* and *Bellas Hess*, a strong and equally clear replacement would be warranted, because "economic nexus" alone will not adequately constrain state power to Constitutional limits. Applying an "economic nexus" standard would be a blank check to States and their local governments and taxing districts to impose undue burdens on interstate commerce by imposing tax collection obligations on remote vendors outside of their respective borders. Presumably, this will be addressed in Respondents' Brief and is not argued here. Suffice it to say that any replacement "bright-line" test should be consistent with the requirements under the dormant Commerce Clause that are intended to prevent States from imposing requirements that unduly burden interstate commerce.

IV. IN LIGHT OF THE SEVERE BURDEN ON INTERSTATE COMMERCE THAT WOULD RESULT IF *QUILL* WERE ABROGATED, STATE AUTHORITY TO ENFORCE ITS TAX LAWS AGAINST REMOTE SELLERS SHOULD NOT BE FURTHER EXTENDED TO LOCAL JURISDICTIONS.

Were the Court to find that the burdens associated with requiring a remote vendor to collect sales tax for

South Dakota are not constitutionally excessive, there would remain the issue of the extreme burden associated with the process of collecting sales taxes from multiple jurisdictions within the same state. Merely collecting sales tax from a political subdivision is a significant enough burden, but the prospect of being potentially subject to audits, documentation requests, discovery and administrative procedures from 12,000 jurisdictions, merely as a consequence of posting publicly on a website, is an even more daunting proposition. No consideration has been given on this point and no facts have been developed.

A. The Prospect of Having to Comply With Disparate Local Tax Schemes Compounds the Complexity of Collection and Compliance.

The remote vendor faces a quantitatively more daunting task of compliance than do local vendors that operate from a specific physical location in the State and purchasers who reside at a specific place in the State. Each of these latter taxpayers knows where he or it is located, and can easily determine the tax payment due or collection obligations with respect to that discrete location. On the other hand, the remote vendor, in order to correctly determine taxability and ascertain the appropriate tax rate for each item sold, must be potentially prepared to make these same determinations accurately, and in real time, taking into consideration the differences that can and do exist among 12,000 different taxing jurisdictions. Imposing

this burden on remote vendors is precisely what the Advisory Commission on Electronic Commerce recommended against.[28]

The combinations and permutations of outcomes alone would indicate the potential for chaos. With local taxing jurisdictions, each having separate rates, different tax holidays, and different exemptions – the complexity multiplies because each variation of factors results in a different outcome.

Consider resale exemptions for example. JTV has many customers who watch its "Jewel School" programming to learn how to make jewelry. Some of them start businesses to sell jewelry of their own as retailers. Under most state sales tax statutes, each reseller would be entitled to an exemption certificate and legally permitted to require JTV not to withhold sales tax on an exempt sale for resale. JTV estimates that 50,000 to 100,000 customers likely fall into this category in a given year. Administering these exemptions on a jurisdiction-by-jurisdiction basis is an incredible paperwork task, not even considering the software implications.

The Court in *Bellas Hess* correctly recognized that forcing out-of-state vendors to collect sales tax for every taxing jurisdiction would "entangle [their] interstate business in a virtual welter of complicated obligations."[29] "The very purpose of the Commerce Clause

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[28] *See supra*, p.15.

[29] *Nat'l Bellas Hess, Inc., v. Ill. Dep't of Rev.*, 386 U.S. 753, 760 (1967).

was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control."[30] Continuation of the *Quill* rule will avoid ensnaring out-of-state vendors in these local entanglements and thus prevent an undue burden on interstate commerce.

B. Local Tax Schemes Raise a Novel Constitutional Question as to Differential Treatment if a State Permits Localities to Enforce Disparate Local Rules for Taxation of Interstate Commerce While Concurrently Not Requiring Consistency Among Localities within the Same State.

If the Court were to abrogate the *Quill* rule, it would need to further consider whether the Constitution contemplates and allows schemes for taxation of remote vendors by *local* jurisdictions in situations where the application of local rules creates conflicts with rules within the same state jurisdiction. What would happen if each locality were to define its tax base differently, even though all local, political subdivisions of a State are instrumentalities of the same State?

Local jurisdictions typically may only audit within their physical borders. If *Quill* were abrogated, could a local jurisdiction audit a remote vendor under its own State's laws even though it would not be entitled to

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[30] *Id.*

audit a vendor in the adjoining county? Could a locality enforce its tax scheme everywhere else in the country even though, within its own State, the local jurisdiction would not have the power to enforce the same scheme with in-state consumers residing outside its physical boundaries?

These questions raise the issue of improper, differential treatment between in-state and out-of-state retailers burdened by disparate local requirements. *See Wynne*, 135 S.Ct. at 1795. The Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[31]

If a locality were not able to apply its tax base, rates, and exemption policies *intrastate* (e.g., in adjacent counties), and lacked *intrastate* audit jurisdiction, but was not similarly constrained in its *interstate* domain, serious dormant Commerce Clause issues would be implicated.

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[31] *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-27 (1979)).

C. A National Power of Audit Vested in a Local Taxing Authority is a *Per Se* Burden on Interstate Commerce.

If *Quill* were abrogated, what lawful ability would each locality have to enforce its taxes nationally, even if no sales had been made within a locality? Would the ubiquitous nature of the Internet mean that every remote vendor with a website would be subject to audit, documentation demands, and disclosure requirements by every local taxing jurisdiction in the country, even if the vendor had made no sales to customers in that jurisdiction? Would out-of-state consumers become subject to tax oversight by foreign political subdivisions as well?

In a national economy devoid of the certainty created by the "bright-line" rule of *Quill*, in theory, every local taxing jurisdiction could simultaneously open sales tax audits on every remote vendor with a website, and send a demand letter requesting all of every Internet retailer's tax records to enforce compliance with its local sales tax regime. Even if an Internet retailer were to contend it did no business whatsoever in that locality, what would constrain the local taxing authorities from demanding an audit in furtherance of its effort to search out non-compliance, and in the context of the audit place the burden on the retailer to prove that it had made no sales into that jurisdiction? The mere prospect of national audits initiated by cities, counties, municipalities, and special tax districts is virtually *per se* an undue burden on interstate commerce.

D. Locally-Administered Tax Schemes Imposed Nationally on Remote Vendors Are a Recipe for Tax Chaos.

Every time a rule were to change in any one of the 12,000 local taxing jurisdictions, there is the potential that the tax administration software would have to be changed. The change might be the rate, geographical boundaries defining different rates or classes of consumers, the administrative reimbursement due to the collector, the timing of a tax holiday (such as the constantly shifting "tax-free weekends" so common now), the applicability of a particular exemption, or the "scale" upon which the tax is calculated, where a progressive or tiered rate structure applies. Each time one change occurs, a software update or rewrite would be dictated for each of the systems into which the tax module must be integrated.

The number of permutations and combinations of outcomes would not be merely arithmetically increased, but also increased geometrically which would lead to an unworkable system that required the vendor either to somehow implement costly changes to assure ongoing compliance, or more likely simply forego making sales to customers in those localities and suffer the corresponding loss of revenues that would entail.

As a consequence, such a regime could lead to systems that strongly discriminate in favor of in-state retailers. A local retailer with a physical location need only collect at one tax rate (whatever the local rate might be), and is not required to solicit the name and

address of its customers to determine their place of residence or place where the purchased item will be used. A retailer with a local physical presence may choose its domicile and thereby choose to be under a single taxing scheme, favoring simplicity for the local retailer. In contrast, an Internet retailer whose only connection, besides making a sale, is a virtual presence on the Internet, cannot choose to opt out of any local jurisdiction from which its website may be accessed and orders may be made and shipped to.

Even if a local retailer were to operate in two or three other tax jurisdictions, its tax compliance requirements remain simple – each place of business would collect at one rate and no customer information is required. For the out-of-state retailer, however, the opposite is true. Not only would the retailer be required to track multiple rates, but it would be required to preserve customer information such as the shipping address in order to document that it collected tax at the correct rate applicable to that address. This problem could be mitigated with a one rate per state arrangement, but merely abrogating *Quill* does not lead to that result.

Contrary to Petitioner's assertion that "absentee retailers want to 'preserve' an unfair tax advantage,"[32] JTV does not wish to do so at all. For over a decade, JTV has argued to the States and to Congress for a sensible, one rate per state tax scheme. Local vendors pay one rate. The Court should not choose to replace

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[32] Petitioner's Brief, at 33.

one perceived unfairness (allowing remote sellers to remain exempt) with another (subjecting remote sellers to complex tax rules that would be virtually impossible to follow).

V. WERE THE COURT TO ABROGATE OR CHANGE THE *QUILL* RULE TO PERMIT STATES TO HAVE TAXING JURISDICTION OVER REMOTE SELLERS, ANY NEW RULE SHOULD BE LIMITED TO STATES THAT ADOPT A SIMPLE TAX COLLECTION SYSTEM.

JTV's software engineers report that developing software that would allow JTV to collect sales tax from its customers in remote States that have a simple sales tax system with only one rate, one base, and one set of rules, all in an easily downloadable format, is workable, and over time could be implemented without undue expense and burden on JTV, or even the smallest electronic retailer. JTV's unsuccessful experience in attempting to comply with Colorado's complex sales tax collection requirements, as compared with its successful effort to comply with Connecticut's simple one rate state system, illustrates this.[33]

Accordingly, to avoid uncertainty and confusion and creating significantly adverse effects on e-commerce, JTV urges that any change in *Quill* be conditioned upon the change being applicable only to

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[33] JTV has recently begun collecting sales tax in Connecticut, where there is one rate and one set of rules.

States that implement a simplified sales tax collection system for out-of-state vendors that includes at a minimum the simplification requirements in SSUTA, and in addition one tax rate per state, a critical necessity for simplification.[34]

This would, of course, require each State to coordinate with its subordinate local governments and taxing districts, but if implemented would allow the States to recover essentially 100% of sales taxes applicable from sales from remote vendors to customers in the taxing States without significant complexity, cost, or unreasonable interference with or burden on interstate commerce. Of course each State could choose not to opt for simplicity, with the consequence being that it would have to forego requiring remote vendors to collect sales tax from its customers.

Respectfully, the States have spent the past 25 years trying to circumvent *Quill* and complaining about its effect, all the while being in most cases unwilling or unable to take action to make their tax collection systems workable for remote vendors. Their inaction should not be rewarded by the Court.

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[34] *See* Kendall L. Houghton & Gary C. Cornia, *The National Tax Association's Project on Electronic Commerce and Telecommunication Taxes*, 53:4 Nat'l Tax J. 1351, 1361 (2000) (The Steering Committee consisting of 16 business, 16 governmental, and 7 other representatives "adopted a consensus position that there should be one sales tax rate in each of the states that have adopted the sales tax and granted the use of local option taxes for substate – level governments.").

CONCLUSION

For the foregoing reasons, the decision of the South Dakota Supreme Court should be affirmed. Alternatively, if the Court determines that the *Quill* rule should be altered, any relief should be limited to States that adopt the tax simplification rules in SSUTA and in addition, one rate per state.

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